CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO

THE CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

TO: MARTIN C. BERNHOLTZ, CPA, CA

AND TO: The Discipline Committee of CPA Ontario

The Professional Conduct Committee of CPA Ontario hereby makes the following Allegation of professional misconduct against Martin C. Bernholtz, CPA, CA, a member of CPA Ontario:

1. THAT the said Martin C. Bernholtz, in or about the period February 1, 2016 through March 31, 2016, while acting as a director of Titan Medical Inc. ("Titan"), failed to maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1 of the Rules of Professional Conduct, in that he engaged in conduct that was contrary to the public interest by:

    a. failing to conduct a sufficiently careful assessment of the materiality of the information he possessed concerning overnight marketed public offerings by Titan when he sold shares of Titan in advance of the overnight marketed public offerings by Titan and when he reinvested for more shares in the offerings; and

    b. failing to abide by Titan's Insider Trading Policy by failing to seek the required approval prior to trading shares of Titan and by failing to inform Titan of the trades after they were completed,

    as described in the Settlement Agreement with the Ontario Securities Commission, attached as Schedule "A".

Dated at Toronto, Ontario, this 22 day of October, 2019

Ken McKay

K. A. MCKAY, CPA, CA, DEPUTY CHAIR
PROFESSIONAL CONDUCT COMMITTEE

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

FILE NO. 2018-16

IN THE MATTER OF
MARTIN BERNHOLTZ

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. It is essential to the integrity of Ontario's capital markets that directors of public companies exhibit the highest standard of conduct. This case involves Martin Bernholtz ("Bernholtz" or the "Respondent"), a director of a publicly traded company who sold shares of the company in advance of overnight marketed offerings by the company and then reinvested for more shares in the offerings. The Respondent failed to obtain the required pre-approval and to take sufficient care as to the risk that he may have possessed material non-public information at the time he sold the company shares, which was conduct that fell below the high standard expected of him and was contrary to the public interest.

2. This matter concerns trading by Bernholtz between February and March 2016 (the "Material Time").

3. The parties shall jointly file a request that the Ontario Securities Commission (the "Commission") issue a Notice of Hearing (the "Notice of Hearing") to announce that it will hold a hearing (the "Settlement Hearing") to consider whether, pursuant to sections 127 and 127.1 of the *Securities Act* (the "Act"), it is in the public interest for the Commission to make certain orders against the Respondent in respect of the conduct described herein.

PART II - JOINT SETTLEMENT RECOMMENDATION

4. Staff of the Commission ("Staff") recommend settlement of the proceeding (the "Proceeding") against the Respondent commenced by the Notice of Hearing, in

accordance with the terms and conditions set out in this Settlement Agreement. The Respondent consents to the making of an order (the "Order") in substantially the form attached as Schedule "A" to this Settlement Agreement based on the facts set out herein.

5. For the purposes of the Proceeding, and any other regulatory proceeding commenced by a securities regulatory authority, the Respondent agrees with the facts set out in Part III of this Settlement Agreement and the conclusion in Part IV of this Settlement Agreement.

PART III - AGREED FACTS

A. Background

(1) Titan Medical Inc.

6. Titan Medical Inc. ("Titan") is a public company incorporated in Ontario.

7. The shares of Titan are listed on the Toronto Stock Exchange ("TSX") under the symbol "TMD".

8. Titan's primary business is the design, development and commercialization of new robotic surgical technologies.

(2) Martin Bernholtz

9. Bernholtz is a resident of Markham, Ontario.

10. Bernholtz had been a director of Titan from July 2008 until March 2018, when he resigned.

B. Facts

11. Titan generates no revenue and relies on the public offering of its common shares and warrants to fund its development process.

12. The Board of Directors of Titan (the "Board") receives notice of anticipated public offerings in advance.

(1) February 2016 Offering

13. On January 29, 2016, Bernholtz and other members of the Board were advised by Stephen Randall ("Randall"), the Chief Financial Officer of Titan, of a public offering that was planned to "commence as early as Tuesday, February 2 but no later than Thursday, February 11". No details of possible price or quantum were provided.

14. On February 1, 2016, Bernholtz sold 110,400 Titan shares at share prices of $1.34 to $1.39 for total proceeds of $147,973.32.

15. On February 2, 2016, in response to an enquiry from IIROC Market Surveillance, Titan issued a press release announcing that it was not aware of any material undisclosed development at this time that would cause the recent movement in the company's share price.

16. On February 3, 2016, the share price of Titan opened at $1.54. At 3:55 p.m., Titan issued a press release announcing an overnight marketed public offering (the "February 2016 Offering"), comprised of its common shares and common share purchase warrants. The share price of Titan closed at $1.45 at the end of the trading day.

17. On February 4, 2016, the share price of Titan opened at $1.03, went to a high of $1.09 and closed at a low of $0.95.

18. On February 5, 2016, the share price of Titan opened at $0.88. At 10:08 a.m., Titan issued a press release announcing that the February 2016 Offering would consist of 8,888,889 units issued at a price of $0.90 per unit for aggregate proceeds of $8,000,000. Each unit would consist of one common share and one common share purchase warrant, which would be exercisable to purchase one common share at a price of $1.00 for a period of five years after the public offering. The share price of Titan closed at $0.80 at the end of the trading day.

19. Information regarding the February 2016 Offering had not been generally disclosed prior to the press releases on February 3 and February 5, 2016.

20. On February 11, 2016, Bernholtz purchased 200,000 Titan units at the price of $0.90 per unit, for a total purchase price of $180,000 pursuant to the February 2016 Offering.

21. If the 110,400 Titan shares had not been sold in advance of the announcement of the February Offering, they would have been worth approximately $55,000 less in the days following the announcement of the February Offering.

(2) March 2016 Offering

22. On March 16, 2016, Bernholtz attended a meeting of the Board where the Board was advised of a public offering that was planned to commence "[l]ate this week or early week of March 21, 2016".

23. On March 17, 2016, Bernholtz sold 22,200 Titan shares at the share price of $1.36 for total proceeds of $30,192.

24. On March 18, 2016, Bernholtz further sold 12,800 Titan shares at the share price of $1.23 for total proceeds of $15,744.

25. On March 21, 2016, Bernholtz further sold 233,900 Titan shares at share prices of $1.08 to $1.20 for total proceeds of $271,489.

26. In total during this period, Bernholtz sold 268,900 Titan shares for total proceeds of $317,425.

27. On March 21, 2016, the share price of Titan closed at $1.08. After the market closed, Titan issued a press release announcing its intention to undertake an overnight marketed public offering (the "March 2016 Offering"), comprised of its common shares and common share purchase warrants.

28. On March 22, 2016, before the market opened, Titan issued a further press release announcing that the March 2016 Offering would consist of units issued at a price of $1.00 per unit. Each unit would consist of one common share and one common share purchase warrant, which would be exercisable to purchase one common share at a price of $1.20 for a period of five years after the public offering. The share price of Titan on March 22, 2016 opened at $0.85 and closed at $0.92.

29. Information regarding the March 2016 Offering had not been generally disclosed prior to the press releases on March 21 and March 22, 2016.

30. On March 28, 2016, Bernholtz purchased 400,000 Titan units at the price of $1.00 per unit, for a total purchase price of $400,000 pursuant to the March 2016 Offering.

31. If the 268,900 Titan shares had not been sold in advance of the announcement of the March Offering, they would have been worth approximately $78,000 less in the days following the announcement of the March Offering. Bernholtz held all of his Titan shares as the share price dropped by more than 80% over the next year.

(3) Titan Insider Trading Policy

32. Titan's Insider Trading Policy (the "Insider Trading Policy") prohibited directors, officers and employees and any person in a special relationship with Titan from buying or selling securities of Titan while having material information that has not yet been made public and required directors and officers to seek approval from Titan prior to trading shares of Titan.

33. During the Material Time, Bernholtz was aware of the Insider Trading Policy and the fact that it applied to him.

34. Bernholtz failed to seek approval prior to trading shares of Titan during the Material Time. Similarly, Bernholtz failed to inform Titan of the trades during the Material Time after they were completed.

C. Respondent's Position and Mitigating Factors

35. The Respondent requests that the Settlement Hearing panel consider the following mitigating circumstances. Staff do not object to the mitigating circumstances set out by the Respondent.

(a) By the Respondent agreeing to this settlement, the Commission will not have to expend further resources that would have been incurred in a contested hearing;

(b) The Respondent sold the Titan shares to permit him to buy into the offerings to show support for Titan but did not sufficiently consider the risks of selling in the circumstances;

(c) The Respondent acknowledges that he should have conducted a more careful assessment of the materiality of the information he possessed. He accepts that the more prudent course of conduct would have been to not trade Titan securities in advance of the February and March 2016 Offerings. He also acknowledges that he should have complied with Titan's Insider Trading Policy; and

(d) The Respondent has not been the subject of any prior Commission proceedings or orders.

PART IV - CONDUCT CONTRARY TO THE PUBLIC INTEREST

36. Bernholtz was the director of a publicly traded company. He occupied a position of high responsibility and trust. By engaging in the foregoing conduct, he failed to abide by that high standard. He was obliged to be carefully attuned to trading issues and the possible materiality of information that came to his attention. In this case, he failed to sufficiently assess the materiality of his knowledge of the pending offerings before the details were announced.

37. As a director of a public company, Bernholtz was also obliged to assiduously follow company policies and regulations respecting the reporting of his trades. Titan had a rigorous pre-trade approval process. This process was designed, among other reasons, to ensure that Titan employees did not trade while in possession of non-public material information. In this case, Bernholtz failed to pre-clear his trades in compliance with Titan's Insider Trading Policy.

38. Bernholtz's failure to abide by Titan's Insider Trading Policy and his failure to conduct a more careful assessment of the materiality of the information concerning the financings engages the fundamental purposes and principles in subsections 1.1(a) and (b) and subsection 2.1(2)(iii) of the Act.

PART V - TERMS OF SETTLEMENT

39. The Respondent agrees to the terms of settlement set forth below.

40. The Respondent consents and agrees to make a voluntary payment in the amount of $225,000.

41. The Respondent agrees to the terms of settlement listed below and to the Order in substantially the form attached as Schedule "A" to this Settlement Agreement, to be made by the Commission pursuant to section 127 and section 127.1 of the Act, the terms of which include that:

(a) this Settlement Agreement be approved;

(b) the voluntary payment of $225,000 by the Respondent is designated for allocation or use by the Commission in accordance with paragraph 3.4(2)(b)(i) or (ii) of the Act;

(c) trading in any securities or derivatives by the Respondent cease for a period of three (3) years commencing on the date that is 45 days from the date of the Order, pursuant to paragraph 2 of subsection 127(1) of the Act;

(d) the acquisition of any securities by the Respondent be prohibited for a period of three (3) years and 45 days commencing on the date of the Order, pursuant to paragraph 2.1 of subsection 127(1) of the Act;

(e) the Respondent be reprimanded, pursuant to paragraph 6 of subsection 127(1) of the Act;

(f) the Respondent immediately resigns any position that the Respondent holds as a director or officer of any reporting issuer or registrant, pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act;

(g) the Respondent be prohibited from becoming or acting as a director or officer of any reporting issuer or registrant for a period of seven (7) years, pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act; and

(h) the Respondent pays costs in the amount of $75,000, pursuant to section 127.1 of the Act.

42. The Respondent consents to a regulatory order made by any provincial or territorial securities regulatory authority in Canada containing any or all of the sanctions set out in subparagraphs 41(c) through 41(g). These sanctions may be modified to reflect the provisions of the relevant provincial or territorial securities law.

43. The Respondent acknowledges that this Settlement Agreement and the Order may form the basis for orders of parallel effect in other jurisdictions in Canada. The securities laws of some other Canadian jurisdictions allow orders made in this matter to take effect in those other jurisdictions automatically, without further notice to the Respondent. The Respondent should contact the securities regulator of any other jurisdiction in which the Respondent intends to engage in any securities- or derivatives-related activities, prior to undertaking such activities.

44. The Respondent agrees to make the voluntary payment specified in subparagraph 41(b) and the costs payment specified in subparagraph 41(h) by separate bank drafts or certified cheques payable to the Ontario Securities Commission prior to the issuance of any Commission order approving this settlement Agreement.

PART VI - FURTHER PROCEEDINGS

45. If the Commission approves this Settlement Agreement, Staff will not commence or continue any proceeding against the Respondent under Ontario securities law based on the misconduct described in Part III or Part IV of this Settlement Agreement, unless the Respondent fails to comply with any term in this Settlement Agreement, in which case Staff may bring proceedings under Ontario securities law against the Respondent that may be based on, among other things, the facts set out in Part III or Part IV of this Settlement Agreement as well as the breach of this Settlement Agreement.

46. The Respondent acknowledges that, if the Commission approves this Settlement Agreement and the Respondent fails to comply with any term in it, the Commission is entitled to bring any proceedings necessary.

47. The Respondent waives any defences to a proceeding referenced in paragraph 45 or 46 that are based on the limitation period in the Act, provided that no such proceeding shall be commenced later than six years from the date of the occurrence of the last failure to comply with this Settlement Agreement.

PART VII - PROCEDURE FOR APPROVAL OF SETTLEMENT

48. The parties will seek approval of this Settlement Agreement at the Settlement Hearing before the Commission, which shall be held on a date determined by the Secretary to the Commission in accordance with this Settlement Agreement and the Commission's *Rules of Procedure* (2017), 40 O.S.C.B. 8988.

49. The Respondent will attend the Settlement Hearing in person.

50. The parties confirm that this Settlement Agreement sets forth all of the agreed facts that will be submitted at the Settlement Hearing, unless the parties agree that additional facts should be submitted at the Settlement Hearing.

51. If the Commission approves this Settlement Agreement:

(a) the Respondent irrevocably waives all rights to a full hearing, judicial review or appeal of this matter under the Act; and

(b) the parties will not make any public statement that is inconsistent with this Settlement Agreement or with any additional agreed facts submitted at the Settlement Hearing.

52. Whether or not the Commission approves this Settlement Agreement, the Respondent will not use, in any proceeding, this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, alleged unfairness or any other remedies or challenges that may be available.

PART VIII - DISCLOSURE OF SETTLEMENT AGREEMENT

53. If the Commission does not make the Order:

(a) this Settlement Agreement and all discussions and negotiations between Staff and the Respondent before the Settlement Hearing will be without prejudice to Staff and the Respondent; and

(b) Staff and the Respondent will each be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing on the merits of the allegations contained in the Statement of Allegations in respect of the Proceeding. Any such proceedings, remedies and challenges will not be affected by this Settlement Agreement, or by any discussions or negotiations relating to this Settlement Agreement.

54. The parties will keep the terms of this Settlement Agreement confidential until the Settlement Hearing, unless they agree in writing not to do so or unless otherwise required by law.

PART IX - EXECUTION OF SETTLEMENT AGREEMENT

55. This Settlement Agreement may be signed in one or more counterparts which together constitute a binding agreement.

56. A facsimile copy or other electronic copy of any signature will be as effective as an original signature.

DATED at Toronto, Ontario this 15th day of May, 2019.

Witness:

Martin Bernholtz

DATED at Toronto, Ontario, this 16th day of May, 2019

STAFF OF THE ONTARIO SECURITIES COMMISSION

By:

Name: Jeff Kehoe
Title: Director, Enforcement Branch

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

DISCIPLINE COMMITTEE

IN THE MATTER OF: An allegation against **MARTIN C. BERNHOLTZ, CPA, CA**, a Member of CPA Ontario, under **Rule 201.1** of the Rules of Professional Conduct.

TO: Martin C. Bernholtz, CPA, CA

AND TO: The Professional Conduct Committee

DECISION AND ORDER MADE FEBRUARY 18, 2020

DECISION

The Allegation that Martin C. Bernholtz has breached Rule 201.1 of the Professional Code of Conduct is established, and he has committed professional misconduct.

ORDER

IT IS ORDERED THAT:

1. Martin C. Bernholtz be reprimanded in writing by the Chair of the hearing;

2. Martin C. Bernholtz shall pay a fine of $15,000 to the Chartered Professional Accountants of Ontario ("CPA Ontario") by May 18, 2020;

3. Martin C. Bernholtz is suspended from the rights and privileges of membership in CPA Ontario for a period of six months from the date of this Decision and Order;

4. Notice of this Decision and Order, disclosing Martin C. Bernholtz's name, is to be given in the form and manner determined by the Discipline Committee:

   (a) to all members of CPA Ontario;
   (b) to all provincial bodies;

   and shall be made available to the public;

5. In the event that Martin C. Bernholtz fails to comply with paragraphs 2 and 6 of this Order by August 18, 2020, his membership in CPA Ontario shall be revoked, and notice of the revocation, disclosing his name, shall be given in the manner specified above, and in The Globe and Mail. All costs associated with this publication shall be borne by Martin C. Bernholtz and shall be in addition to any other costs ordered by the Panel.

AND THAT:

6. Martin C. Bernholtz shall pay costs of $6,600 to CPA Ontario by, May 18, 2020.

DATED at Toronto this 18th day of February, 2020.

Stephen F. Dineley, FCPA, FCA
Discipline Committee – Deputy Chair

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
THE CHARTERED PROFESSSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

DISCIPLINE COMMITTEE

IN THE MATTER OF: Allegations against **MARTIN C. BERNHOLTZ, CPA, CA**, under **Rule 201.1** of the Chartered Professional Accountants of Ontario Rules of Professional Conduct, as amended.

BETWEEN:

Chartered Professional Accountants of Ontario
Professional Conduct Committee

-and-

Martin C. Bernholtz

APPEARANCES:

For the Professional Conduct Committee:	Kelvin Kucey and Swapna Chandra, Counsel
For Martin C. Bernholtz:	Kevin Richard, Counsel
Heard:	February 18, 2020
Decision and Order effective:	February 18, 2020
Release of written reasons:	March 17, 2020

REASONS FOR DECISION AND ORDER MADE FEBRUARY 18, 2020

I. OVERVIEW

[1] The Professional Conduct Committee of the Chartered Professional Accountants of Ontario ("PCC") made an Allegation that Martin C. Bernholtz had failed to maintain the good reputation of the profession by failing to sufficiently assess the materiality of information he possessed regarding a company of which he was a director, and failing to comply with the company's relevant internal policies, before selling shares in the company ("the Allegation"). This hearing was held to determine whether the Allegation was established and whether the conduct breached Rule 201.1 of the CPA Ontario Rules of Professional Conduct and amounted to professional misconduct.

[2] Mr. Bernholtz holds a CA and CPA designation and is, and at all relevant times was, a member of CPA Ontario and its predecessor. From July 2008 until March 2018, he was a director of a company that designed and developed surgical equipment, TM Inc. TM Inc. was a publicly traded company. As a publicly traded company, TM Inc. had an Insider Trading Policy that prohibited directors, officers and employees from, among other things, buying or selling securities of TM Inc. while having material information that had not yet been disclosed to the public.

[3] In February and March 2016, Mr. Bernholtz sold shares in TM Inc. at times when he knew that TM Inc. was going to make a public share offering, but before that information was made public. He did not disclose these sales to TM Inc. in advance of the sales, in breach of the TM Inc. Insider Trading Policy.

[4] On January 29, 2016, Mr. Bernholtz and the other directors of TM Inc. were advised that TM Inc. would be making a public offering on February 2, 2016, or shortly thereafter. On February 1, 2016, Mr. Bernholtz sold 110,400 shares of TM Inc. at prices between $1.34 and $1.39 per share.

[5] On February 3, 2016, TM Inc. issued a press release announcing, for the first time publicly, an overnight marketed public offering of common shares. Subsequently, the share price for TM Inc. dropped. If Mr. Bernholtz had not sold his shares before that announcement, they would have been worth approximately $55,000 less than when they were sold.

[6] On February 11, 2016, Mr. Bernholtz purchased, through the public offering, 200,000 shares in TM Inc. at $0.90 per share.

[7] On March 26, 2016, Mr. Bernholtz and the other directors of TM Inc. were advised that TM Inc. would be making a public offering later in the week, or shortly thereafter. In three transactions between March 17, 2016, and March 21, 2016, Mr. Bernholtz sold 239,000 shares of TM Inc. at prices ranging from $1.08 to $1.39 per share.

[8] On March 21, 2016, TM Inc. issued a press release announcing, for the first time publicly, an overnight marketed public offering of common shares. On March 22, 2016, before the markets opened, TM Inc. issued a further press release indicating that the shares in the offering would be issued at $1.00 per share. Subsequently, the share price for TM Inc. dropped. If Mr. Bernholtz had not sold his shares before that announcement, they would have been worth approximately $78,000 less than when they were sold.

[9] On March 28, 2016, Mr. Bernholtz purchased, through the public offering, 400,000 shares in TM Inc. at $1.00 per share.

[10] Subsequently, on March 28, 2018, the Ontario Securities Commission (“OSC”) issued a Statement of Allegations (the “OSC Statement of Allegations”) against Mr. Bernholtz in relation to these transactions. On May 21, 2019, Mr. Bernholtz

entered into a Settlement Agreement with the OSC (the "OSC Settlement Agreement").

[11] Mr. Bernholtz did not admit the Allegation of professional misconduct made by the PCC. The onus was on the PCC to show on a balance of probabilities that Mr. Bernholtz's conduct breached Rule 201.1 of the CPA Ontario Rules of Professional Conduct and constituted professional misconduct.

II. PRELIMINARY ISSUES

[12] At the outset of the hearing, counsel for the PCC advised the Panel that he was seeking a minor amendment to the Notice of Allegation. The PCC asked that the words "as amended" be inserted after the words "Rules of Professional Conduct". Counsel for Mr. Bernholtz confirmed that Mr. Bernholtz did not oppose the request.

[13] Counsel explained that this amendment was intended to capture the fact that the Rules of Professional Conduct had been replaced by the CPA Ontario Code of Professional Conduct, effective February 26, 2016. As this date fell in the middle of the time period framed by the Notice of Allegation, some of the conduct would have occurred while the Rules of Professional Conduct were in effect, and some of the conduct occurred while the Code of Professional Conduct was in effect. Although there were not significant differences in the relevant provisions, this amendment was intended to reflect this formal change.

[14] The Panel permitted the amendment. In these Reasons, references to the Rules of Professional Conduct will incorporate the parallel provisions of the Code of Professional Conduct after February 26, 2016.

III. ISSUES

[15] The Panel identified the following issues arising from the Allegation:

A. Did the evidence establish, on a balance of probabilities, the facts on which the Allegation by the PCC was based?

B. If the facts alleged by the PCC were established on the evidence on a balance of probabilities, did the Allegation constitute professional misconduct?

IV. DECISION

[16] The Panel found that the evidence established, on a balance of probabilities, the facts set out in the Allegation of professional misconduct, as amended at the commencement of the hearing.

[17] The Panel was satisfied that the Allegation constituted a breach of Rule 201.1 and, having breached this Rule, Mr. Bernholtz had committed professional misconduct.

V. REASONS FOR THE DECISION

Findings regarding Conduct of Mr. Bernholtz

[18] The evidence was placed before the Panel on an uncontested basis. On the agreement of the parties, the PCC submitted a Document Brief containing the OSC Settlement Agreement , the OSC Order, dated May 21, 2019, and the OSC's related Reasons for Approval of the Settlement. The Document Book also contained copies of the TM Inc. Insider Trading Policy and the TM Inc. Code of Conduct.

[19] The Panel accepted the facts set out in the OSC Settlement Agreement as having been established in this proceeding. However, the Panel recognized that in accepting these facts that the Panel and the parties were confined to them. It was not open to either party, or the Panel, to look beyond the agreed facts in the OSC Settlement Agreement to advance findings of fact that were not established by the evidence.

[20] The PCC also included in the Document Book the OSC Statement of Allegations, . Counsel for Mr. Bernholtz submitted that this document was entitled to little weight as it reflected allegations only, and those allegations were significantly different than the facts set out in the OSC Settlement Agreement. The Panel agreed with this submission and gave no weight to the OSC Statement of Allegations in its deliberations.

[21] In the Panel's view, there were two primary facts alleged by PCC in the Allegation. First, PCC alleged that Mr. Bernholtz failed to "conduct a sufficiently careful assessment of the materiality of the information he possessed concerning overnight marketed public offerings by [TM Inc.]" when he sold shares in TM Inc. before the public offerings were made. Second, the PCC alleged that Mr. Bernholtz had failed to abide by the Insider Trading Policy of TM Inc. by failing to obtain approval before trading the shares of TM Inc. and failing to advise TM Inc. of the trades after their completion.

[22] The facts necessary to finding that these allegations were established were effectively summarized, and admitted, in paragraph 1 of the OSC Settlement Agreement:

> 1. The Respondent [Mr. Bernholtz] failed to obtain the required pre-approval and to take sufficient care as to the risk that he may have possessed material non-public information at the time he sold the

> company shares, which was conduct that fell below the high standard expected of him and was contrary to the public interest.

[23] These admissions were reiterated in paragraph 35(c) of the OSC Settlement Agreement.

[24] The Insider Trading Policy of TM Inc. defined material information at paragraph 5 and confidential material information, being material information that was not disclosed to the public, at paragraph 2 of the OSC Settlement Agreement. The Policy also set out a clear prohibition on anyone, including a director, who had confidential material information trading in the securities of TM Inc. until the close of the second business day after the material information was publicly disclosed (at paragraph A1). The Policy required directors to consult the Chief Financial Officer ("CFO") if there was any question regarding a trade.

[25] The Policy also clearly stated, at paragraph B1, that any Reporting Insider, which included a director, had to have the prior approval of the CFO to any trade in TM Inc.'s securities. In addition, any trade had to be reported to TM Inc. after the fact.

[26] With respect to Mr. Bernholtz's failure to comply with the Insider Trading Policy, paragraphs 32 to 34 of the OSC Settlement Agreement established the following facts more specifically:

> 32. [TM Inc.]'s Insider Trading Policy (the "Insider Trading Policy") prohibited directors, officers and employees and any person in a special relationship with [TM Inc.] from buying or selling securities of [TM Inc.] while having material information that has not yet been made public and required directors and officers to seek approval from [TM Inc.] prior to trading shares of [TM Inc.].
>
> 33. During the Material Time, Bernholtz was aware of the Insider Trading Policy and the fact that it applied to him.
>
> 34. Bernholtz failed to seek approval prior to trading shares of [TM Inc.] during the Material Time. Similarly, Bernholtz failed to inform [TM Inc.] of the trades during the Material Time after they were completed.

[27] The Panel was satisfied that, given the clear language of the Policy, and the admissions in the OSC Settlement Agreement, Mr. Bernholtz was obliged to comply with these obligations before selling the shares that he did. The uncontradicted evidence demonstrated that he did not do so. The Panel was satisfied that the evidence established the facts in the Allegation on a balance of probabilities.

[28] There were submissions made before the Panel with respect to the actual materiality of the information that Mr. Bernholtz possessed at the time of the various trades. In the Panel's view, this was not relevant to the decision to be made. The issue before the Panel was whether Mr. Bernholtz made a *sufficiently careful assessment* of the materiality of the information. The Panel did not need to determine whether the information was, in fact, material. Moreover, the facts in the OSC Settlement Agreement actually did not address this question. Those facts only indicated that Mr. Bernholtz did not take sufficient care to consider that question. Counsel for the PCC also acknowledged that the initial allegation by the OSC that Mr. Bernholtz had engaged in insider trading (requiring the actual use of material information) had not been pursued.

Finding of Professional Misconduct

[29] A substantial portion of the submissions on behalf of both the PCC and Mr. Bernholtz focused on the question of whether the "rebuttable presumption" set out in Rule 201.2 applied to the circumstances of this case. In particular, the parties made extensive submissions as to whether Rule 102.1(d), which is incorporated into the threshold in Rule 201.2, and which refers to a member who has been "found guilty of a violation of the provisions or any securities legislation or having entered into a settlement agreement with respect to such matters", applied to the OSC Settlement Agreement entered into by Mr. Bernholtz.

[30] In the Panel's view, the rebuttable presumption provided one avenue by which conduct could be deemed to fall with the provisions of Rule 201.1. Rule 201.1 requires members to "act at all times in a manner which will maintain the good reputation of the profession and its ability to serve the public interest". However, the Panel was satisfied that the Panel could also consider Mr. Bernholtz's conduct against the standard in Rule 201.1, without reference to the rebuttable presumption. Accordingly, the Panel proceeded on this basis and made no determination as to whether the OSC Settlement Agreement fell within the language of Rule 102.1 and, therefore, the rebuttable presumption in Rule 201.2.

[31] The Panel observed that the allegations, as framed in the Notice of Allegation issued by the PCC, did not rely on the findings or decision of the OSC as the basis for the Allegation of professional misconduct. Rather the CPA Notice of Allegation set out two very particular factual allegations regarding Mr. Bernholtz's conduct, which were *described* in the OSC Settlement Agreement. The OSC Settlement Agreement simply provided a means by which the relevant facts could be readily proven. In the Panel's view, the nature of the Allegation supported their conclusion to look at whether that conduct violated the language of Rule 201.1.

[32] In a similar vein, the basis for the decision of the OSC was not in issue before the Panel. Whether the OSC found a breach of the *Securities Act* or found that Mr.

Bernholtz had acted contrary to the public interest was not a question that the Panel had to determine.

[33] As a result, the Panel considered whether the facts in the OSC Settlement Agreement and the other documentary evidence demonstrated that Mr. Bernholtz had engaged in professional misconduct, rather than considering whether the fact that Mr. Bernholtz signed the OSC Settlement Agreement or the decision of the OSC led to that conclusion.

[34] The Panel found that Mr. Bernholtz's failure to adequately assess the materiality of the information in his possession and his failure to comply with the Insider Trading Policy demonstrated that he had failed to maintain the good reputation of the profession. As a director of a publicly traded company, Mr. Bernholtz had a duty to be aware of the policies and directions of TM Inc. In particular, he had an obligation to be aware of the policies that restricted how he dealt with the securities of TM Inc., specifically the Insider Trading Policy. The policy clearly indicated that he needed to get approval from the CFO of TM Inc. before he sold any shares once he was in possession of confidential material information. He did not do so. As a long-time director, there was no reasonable basis on which Mr. Bernholtz could assert that he was unaware of the Insider Trading Policy. He admitted that he was aware of the Policy and its application to him.

[35] The financial impact or significance of Mr. Bernholtz's actions was not relevant to the Panel in determining whether his actions constituted professional misconduct. TM Inc. was to make a public offering of shares. Mr. Bernholtz, as a director, was aware of that information before the public was. The Insider Trading Policy said that he could not trade shares at that time. Knowing that fact, Mr. Bernholtz proceeded to sell shares and did not comply with the policy.

[36] The Panel was satisfied that Mr. Bernholtz's failure to comply with the clear terms of the Policy, or to take any steps to assess the materiality of the information in his possession, fell below the standard of conduct that the public expected of members of the accounting profession. The public are entitled to expect that members of the profession will act in a manner that is beyond question, particularly in matters where money or finances are involved. A failure to comply with policies aimed at protecting against insider trading did not meet that expectation. Consequently, the Panel found that Mr. Bernholtz had acted in a manner that had failed to maintain the good reputation of the profession, contrary to Rule 201.1 of the Rules of Professional Conduct, as amended.

VI. DECISION AS TO SANCTION

[37] After considering the evidence, the law and the submissions of both parties, the Panel concluded that the appropriate sanction was a written reprimand, a fine of

$15,000 payable within three months, a suspension of Mr. Bernholtz's membership for a period of six months, and the usual order as to publication of the decision to all member of CPA Ontario and the decision being available to members of the public.

[38] The Panel also concluded that if Mr. Bernholtz did not pay the fine, and the costs noted below, by the end of his period of suspension that his membership would be revoked.

VII. REASONS FOR DECISION AS TO SANCTION

[39] After the Panel announced that it had made a finding of professional misconduct, counsel for the PCC advised the Panel that the PCC was seeking a written reprimand, a $15,000 fine, a six month suspension and publication of the decision in the publication and website of CPA Ontario and in two newspapers.

[40] Counsel for Mr. Bernholtz confirmed that there was no issue as to the reprimand or the fact of the fine, but Mr. Bernholtz sought a fine of $10,000 and took the position that a suspension was unnecessary and publication of the decision did not need to be placed in newspapers. Mr. Bernholtz accepted that publication in the usual course should occur on the CPA Ontario website and in the CPA Ontario publication.

[41] No additional evidence was tendered in relation to the issue of sanction.

[42] The PCC presented a number of cases in support of its position that a six month suspension was necessary. In turn, counsel for Mr. Bernholtz presented a 2004 Decision of the Discipline Committee in the matter of *Harold Marvin Chapman*, in support of his argument that a suspension was not required. The Panel reviewed these cases carefully and found that each of the cases turned on its specific facts and all of them could be distinguished from the present case on their particular facts. None involved sufficiently similar facts to the present case to provide any assistance or guidance to the Panel.

[43] As a result, the Panel had to consider, from first principles, whether a suspension was required given the nature of the proven misconduct, and, if so, the length of that suspension. The Panel found that the proven misconduct was serious, and certainly required a suspension as a matter of both general and specific deterrence. There are significant obligations on directors. When a CPA undertakes those responsibilities, the public should be able to rely on the fact that the person was a CPA to have confidence that those duties will be executed diligently. Mr. Bernholtz did not fulfil his duties diligently and did not abide by the clear policies that were put into effect by the Board of which he was a member to prevent the risks that Mr. Bernholtz's conduct presented. The public was entitled to have a clear message that CPA Ontario recognized that this type of conduct

brought the reputation of the profession into disrepute and that it needed to be treated seriously.

[44] For these reasons, the Panel concluded that a six month suspension was an appropriate indication that this type of conduct by a CPA was not acceptable. A shorter suspension would not underscore the seriousness of the misconduct and would undermine the public's confidence in the profession and its members.

[45] The Panel recognized that the fact that Mr. Bernholtz did not have a discipline history was a mitigating factor. But, the evidence did not demonstrate any other mitigating factors. In the Panel's view, there was no justification to discount the length of suspension that was otherwise appropriate based on the Panel's view of the seriousness of the misconduct.

[46] With respect to the fine, the Panel considered whether a lesser fine was appropriate. However, the Panel concluded that the amount of $15,000 was reasonable because the conduct was a significant failure by Mr. Bernholtz to meet his obligations as a director and CPA. A lesser amount would suggest that the fine was effectively a "licence fee" for the misconduct in this case.

[47] With regard to publication, the issue for the Panel to decide was whether the decision needed to be published in newspapers as well as on the CPA Ontario website and in the CPA Ontario publication. The latter publication was required under section 48 of Regulation 6-2. However, because Mr. Bernholtz did not hold a public accounting licence, there was no requirement under this section that the decision be published in newspapers. That decision lay in the discretion of the Panel under section 50 of Regulation 6-2. In the Panel's view, the cases cited to it were not helpful on this point as they involved situations where no publication of any sort was sought.

[48] In the Panel's view, the ordinary publication on the CPA Ontario website and in the CPA Ontario publication was necessary as the seriousness of the misconduct required that the public have access to the information. This was the reason for the presumption in favour of this type of publication under section 48 of Regulation 6-2. Publication in these media met this goal.

[49] The purpose of these proceedings was to ensure the protection of the public. The Panel was not satisfied that publication in newspapers advanced this goal in the present day any more than making the decision available on the CPA Ontario website. Moreover, the nature of the offence did not require that additional step. The misconduct, while serious, did not arise in the course of the practice of public accounting, and the OSC had already publicized the conduct insofar as it merited the sanctions ordered by the OSC under the OSC Settlement Agreement. The Panel was not satisfied that there were any circumstances in this case that required further publication in newspapers.

VIII. COSTS

[50] The PCC asked the Panel to award two thirds of the costs incurred by the PCC in the prosecution of this matter, as reflected in the Costs Outline filed. The total costs set out in the Costs Outline was $9,900. Counsel for Mr. Bernholtz did not dispute the costs award sought, noting that any reduction he could argue for would not justify the added expense and time in advancing the argument.

[51] Given the positions of the parties, the Panel ordered that Mr. Bernholtz pay costs in the amount of $6,600 within three months of the order being made.

Dated at Toronto this 17th day of March, 2020

Stephen F. Dineley, FCPA, FCA
Discipline Committee – Deputy Chair

Members of the Panel
Ellen Bessner (Public Representative)
Hamid Farooq, CPA, CGA
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